

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF INDIANA
SOUTH BEND DIVISION

IN THE MATTER OF)	
)	
LEGEND BROADCASTING CORPORATION,)	CASE NO. 98-32030 HCD
)	CHAPTER 11
DEBTOR.)	
)	
SUMMIT RADIO, INC., on behalf of itself)	
and the other UNSECURED CREDITORS,)	
)	
PLAINTIFF,)	
vs.)	ADV. PROC. NO. 98-3108
)	
LEGEND BROADCASTING CORP.,)	
INDIANA LAWRENCE BANK, and)	
other alleged SECURED CREDITORS.)	
)	
DEFENDANTS.)	
)	
BEN LANTERMAN,)	
)	
INTERVENOR.)	

APPEARANCES:

Richard A. Nussbaum, II, Esq., and Cheryl A. Greene, Esq., 5th Floor - Plaza Building, 210 South Michigan Street, Post Office Box 300, South Bend, Indiana 46624; attorneys for Summit Radio, Inc.; and

Karl J. Veracco, Esq., Miller, Carson, Boxberger & Murphy, L.L.P., 1400 One Summit Square, Fort Wayne, Indiana 46802; attorney for Indiana Lawrence Bank.

MEMORANDUM OF DECISION

At South Bend, Indiana, on February 23, 1999.

On August 21, 1998, Summit Radio, Inc. ("Summit"), filed its Complaint to Determine Validity and Extent of Creditor's Interest in Property of the Estate. The court held a trial on the complaint on December 16, 1998, and took the matter under advisement on the same date.

Findings of Fact

Based on the undisputed facts contained in the record, the court makes the following findings of fact:

1. On June 23, 1997, Legend Broadcasting Corporation, the debtor, filed its voluntary petition under Chapter 11 of the Bankruptcy Code, captioned Case No. 97-32262.
2. On April 20, 1998, the court dismissed Case No. 97-32262 for the debtor's failure to pay certain tax liabilities.
3. On May 19, 1998, unsecured creditors, Summit, Sally A. Kauffman, and Daniel A. Caskey, filed an involuntary petition under Chapter 7 of the Bankruptcy Code, captioned Case No. 98-32030, against Legend Broadcasting Corporation.
4. By an agreed order dated July 30, 1998, the involuntary case was converted to a Chapter 7 proceeding.
5. The debtor previously owned and operated a radio station, a broadcasting license granted by the Federal Communications Commission ("FCC License"), and equipment.
6. Prior to the filing of the debtor's bankruptcy cases, the debtor executed a promissory note in favor of Summit.
7. The sum owing on the promissory note to Summit is approximately \$250,000.00.
8. On March 1, 1996, the debtor executed a Security Agreement in favor of Indiana Lawrence Bank, purporting to grant Indiana Lawrence Bank a security interest in the FCC License, "[a]ny and all property rights as may derive from or accrue to the license; and . . . [a]ll proceeds of the foregoing." Security Agreement at 1.
9. On March 21, 1996, Indiana Lawrence Bank filed its UCC Financing Statement relating to the March 1, 1996, Security Agreement and the property described therein.

10 By way of a separate Security Agreement the debtor granted Indiana Lawrence Bank a security interest in all of the debtor's inventory, equipment, accounts, and general intangibles.

11. Indiana Lawrence Bank holds a claim of approximately \$125,000.00 against the debtor's estate.

12. The debtor's FCC License was sold at a court-approved auction in Case No. 98-32030.

13. Indiana Lawrence Bank asserts a security interest in the proceeds from the sale of the broadcasting license, and all assets and equipment of the radio station.

14. Ben Lanterman also asserts a security interest in the amount of \$10,000.00 plus interest in the property of the debtor, including the radio station, the FCC License, the debtor's assets, and its equipment.

Conclusions of Law

Jurisdiction

1. Pursuant to 28 U.S.C. § 157(a) and Northern District of Indiana Local Rule 200.1, the United States District Court for the Northern District of Indiana has referred this case to this court for hearing and determination.

2. After reviewing the record, the court determines that the matter before it is a core proceeding within the meaning of § 157(b)(2)(B) over which this court has jurisdiction pursuant to 28 U.S.C. §§ 157(b)(1) and 1334.

3. This entry shall serve as findings of fact and conclusions of law as required by Federal Rule of Civil Procedure 52, made applicable in this proceeding by Federal Rule of Bankruptcy Procedure 7052. Any conclusion of law more properly classified as a factual finding shall be deemed a fact and any finding of fact more properly classified as a legal conclusion shall be deemed a conclusion of law.

4. The issue sole issue before the court is whether or not a creditor can maintain a valid security interest in the proceeds of the sale of a broadcasting license issued by the Federal Communications Commission (“FCC”).

Liens against the sale proceeds of broadcasting licenses

5. In 1993 the United States Court of Appeals for the Seventh Circuit held that the FCC policy prohibiting security interests in broadcasting licenses prevented creditors from asserting liens against a broadcasting license issued by the FCC. *In re Tak Communications, Inc.*, 985 F.2d 916, 917-19 (7th Cir. 1993).

6. The Seventh Circuit observed:

Whatever the practical benefits might be to creditors in permitting these [security] interests, even to the limited extent permitted by [*In re Ridgely Communications*, 139 B.R. 374 (Bankr. D.Md. 1992)],¹ we agree with the district court that the FCC has consistently and unequivocally refused to recognize such interests.

985 F.2d at 918 (footnote added).

7. Although the Seventh Circuit recognized that the FCC had relaxed its position somewhat in *In re Bill Welch*, 3 F.C.C.R. 6502, 6503 (1988) (approving the for-profit sale of a permit for construction of a cellular telephone facility subject to whatever private rights the permittee had in the license), the court found that “the FCC has not yet gone so far as to abandon its policy precluding creditors from holding security interests in broadcasting licenses.” 985 F.2d at 918-19 (citing *Investment in the Broadcast Industry*, 57 Fed. Reg. 14684, 14685 ¶ 11 (April 22, 1992) (to be codified at 47 C.F.R. pt. 73)).

8. The Seventh Circuit concluded its *Tak* decision, stating: “Whether to permit such interests is, as the parties agree, a matter for the FCC rather than the courts to decide.” 985 F.2d at 919.

¹In *Ridgely*, the court recognized a security interest in the proceeds from the sale of a broadcasting license, not the license itself. 985 F.2d at 918 n.4. The Seventh Circuit distinguished in part the *Ridgely* case, noting that contrary to the factual situation in *Ridgely*, no sale of Tak Communication Inc.’s license had occurred or was contemplated at the time of oral argument. *Id.*

9. Recently, the FCC clarified that holding a security interest in the proceeds of a license does not violate FCC policy, thereby abrogating *Tak* to the extent that it found otherwise. *In re O'Cheskey*, 13 F.C.C.R. 10656 (1998), *aff'g*, 9 F.C.C.R. 986 (Mob. Serv. Div. Comm. Car. Bur. 1994) (opinion and order involving a cellular license).

10. In *O'Cheskey*, an unsuccessful bidder at a bankruptcy sale petitioned the FCC to deny the assignment of an A-block cellular license to the successful bidder, arguing that the proposed assignment would give the debtor's primary creditor, Motorola, an impermissible security interest in an FCC license. With the consent of the FCC, the bankruptcy court had approved the sale of the license and awarded Motorola an allowed claim of \$1.6 million secured by an interest in the debtor's assets, to be paid by the successful bidder upon completion of the sale of the FCC license. The FCC affirmed the order of the Chief of the former Mobile Services Division of the Common Carrier Bureau in *O'Cheskey*, concluding that: (a) the assignment was appropriate; (b) Motorola held no interest in the proceeds from the sale of the license because the debtor's assets (exclusive of the value of the FCC license and the proceeds thereof) were sufficient to secure Motorola's claim; and (c) even if Motorola did have an interest in the proceeds of the sale of the FCC license, that fact did not bar the assignment because the FCC has not articulated a policy against security interests in the proceeds of an FCC license. 13 F.C.C.R. 10656, at ¶¶ 5-7 (citing *In re Application of Bill Welch*, 3 F.C.C.R. 6502 (1988); Amendment of Part I of the FCC rules -- Competitive Bidding, Order, Memorandum Opinion and Order and Notice of Proposed Rule Making, 12 F.C.C.R. 5686, ¶ 12 (1997) (setting forth policies and procedures for spectrum auctions and explicitly recognizing that creditors may hold security interests in the proceeds of an FCC license, but not the license itself)).

11. The underlying order which the FCC affirmed in *O'CHESKEY*, stated in part:

The Court in *Tak* held that the [FCC] has a policy prohibiting a licensee from giving a security interest to a creditor in the proceeds of the sale of a license. It expressly declined to adopt the rationale of *Ridgely*, 139 B.R. 374. We respectfully conclude that the court erred in *Tak*. Moreover, we were not a party to that action. The court's ruling cannot bind the [FCC] to a policy which it does not have.

9 F.C.C.R. at 987, n.8.

12. Based on the FCC's ruling in *O'Cheskey*, the court finds that the FCC has no policy prohibiting security interests in the proceeds of the sale of FCC licenses, including broadcasting licenses. *Accord Orix Credit Alliance, Inc. v. Mills (In re Beach Television Partners)*, 38 F.3d 535, 537 (11th Cir. 1994); *PBR Communications Systems, Inc. v. Jefferson Bank (In re PBR Communications Systems, Inc.)*, 172 B.R. 132, 136 (Bankr. S.D. Fla. 1994);² *In re Thomas Communications, Inc.*, 166 B.R. 846, 849 (S.D.W.Va. 1994) (each noting the clarification of FCC policy in the underlying *O'Cheskey* decision and upholding the validity of security interests in the sale proceeds of broadcasting licenses).

²As the court explained in *PBR Communications Systems, Inc.*:

The right to transfer a broadcast license is a right between the FCC and the licensee. No pledge of the license as security for a loan can interfere with the FCC's regulatory power. Thus, a creditor who obtains a security interest in a license cannot foreclose on that interest and take over the right to broadcast. Only the FCC may determine that right in the exercise of its regulatory power. *See Ridgely*, 139 B.R. at 379.

Once the FCC approves a sale and grants the buyer the right to hold the license, public regulatory functions are not impacted by the pledge of the sale proceeds. Accordingly, the right to receive the proceeds of an approved sale is a private right that a party may pledge to its creditor.

172 B.R. at 136.

Conclusion

The court denies in part Summit's complaint, finding that a creditor can maintain a valid security interest in the proceeds of the sale of a FCC broadcasting license.

SO ORDERED.

Harry C. Dees, Jr., Judge
United States Bankruptcy Court